to pay off the Muar Chettiars in order to save the lands from being foreclosed. I am equally satisfied that under the agreement (Exhibit P6) the defendants are legally bound to pay the monthly interest on behalf of the plaintiff which they failed to discharge. From the account book of the N.P.R. Firm (Exhibit P12), the defendants only paid interest to the Muar Chettiars from July 21, 1962 to March 20, 1964, totalling $1,400, and this is the amount referred to as "less paid to account" under particulars of interest in the statement of claim. After that, no further interest was paid by the defendants which is in breach of the agreement as contained in Exhibit P16.

The final issue to be decided is whether the present action is statute barred. The expressions "the right to sue accrues", "the cause of action accrues" and "the right of action accrues" have been held to mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run. This has been so stated in the judgment of Gill F.J. in *Nasri* v. *Mesah*[5] and reaffirmed by Ali F.J. in the recent case of *Seman bin Taib* v. *Awang Ahmad*.[6] The question in that case is when a cause of action arises. In *Nasri* v. *Mesah*, *ante*, Gill F.J. said at page 34:

"A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (*per* Lord Esher M.R. in *Read* v. *Brown* (1880) 22 Q.B.D. 128, 131).

The learned Federal Judge went on to quote the following passage from the judgment of Lindley L.J. in *Reeves* v. *Butcher*[7]:

"This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp* v. *Garland* (4 Q.B. 519) decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought."

If the plaintiff's claim is in respect of a normal money-lending transaction as alleged by learned counsel for the defence, then I would agree that if no time was specified for repayment, then time runs from the date of the loan. As the claim is based on contract, the claim is statute barred six years from July 21, 1962, *i.e.* date of the loan by the plaintiff to the defendants, by virtue of section 6 of the Limitation Ordinance 1953. However, although the present action is contractual in nature, the cause of action is based on the provision of section 70 of the Contracts (Malay States) Ordinance 1950, and time starts to run when the cause of action arises; and, in my view, the right to bring an action under section 70 in the present case only arises when the plaintiff paid off the loan to the Muar Chettiars which the defendants are bound to pay under the agreement (Exhibit P16). Therefore, the earliest time at which an action could be brought by the plaintiff was on December 7, 1967, being the date of settlement of the loan with the Muar Chettiars. (See Exhibit P3). As the present action was filed on May 27, 1969, the claim is clearly not statute barred

With regard to the contention of learned counsel for the defence that the plaintiff's wife should be brought in as a co-plaintiff, the short answer to the argument is that, although it is true that for the purpose of raising the loan of $7,000 one of the lands which was charged to the Muar Chettiars belonged to the wife of the plaintiff, to all intents and purposes the relevant loan transaction in the present case is between the plaintiff and the Kajang Chettiars. The basis of this action is Exhibit P16 and the document clearly states that the Kajang Chettiars undertook to pay the monthly interest to the Muar Chettiars in the name of the plaintiff. There is no similar undertaking by the Kajang Chettiars to do anything as far as the plaintiff's wife is concerned. As far as the payment of interest is concerned, the Kajang Chettiars were contracting with the plaintiff and this is made clear in Exhibit P16.

Since this is an action under section 70 of the Contracts (Malay States) Ordinance 1950, I think the plaintiff is only entitled to be reimbursed with the amount he had actually paid to the third party including other incidental expenses. I would, therefore, give judgment for the plaintiff against the second and third defendants in the sum of $10,075 and a further sum of $85 for incidental expenses, and costs. However, I make no order against the first defendant.

Order accordingly.

Solicitors: *Skrine & Co.; W. H. Sault.*

MOHAMED HUSIN v. SHUM YIP LEONG RUBBER WORKS LTD.

[O.C.J. (Yong J.) June 22, 1971]

[Kuala Lumpur — Civil Suit No. 49 of 1967]

Factories — Safe system of work — Co-worker — Negligence of.

Machinery — Accident — Report of — Breach of statutory requirements.

Negligence — Breach of statutory duty — Clicking press — Failure to provide a safe system of work — Whether volenti non fit injuria can be pleaded as a defence — Machinery (Driven Machinery) Regulations, 1959, regs. 3, 4 & 32.

Negligence — Contributory negligence — Mere inadvertence not negligence.

Damages — Personal injuries — Arm — Fingers — Amputation.

The plaintiff and one Mustakim were the operators of a clicking press. The plaintiff was working as a feeding operator and Mustakim was the machine operator. It was alleged that while the plaintiff was spreading powder on the rubber sheet Mustakim negligently caused the cutter to descend and cut the plaintiff's right hand, as a result of which four of his fingers had to be amputated.

Held: (1) the defendants had failed to provide a safe system of work for their workers and, therefore, the defendants and their servant Mustakim were negligent;

(2) there was in this case a breach of the Machinery (Driven Machinery) Regulations, 1959 as no guard or fence had been provided to the clicking press;

(3) such inadvertence as there was on the part of the plaintiff in this case did not go so far as to constitute contributory negligence on his part;

(4) the maxim *volenti non fit injuria* could not apply in this case as the defendants were at fault and had committed a breach of a statutory obligation;

(5) taking all relevant factors into consideration damages would be assessed at $14,500.

Cases referred to:-

(1) *Seng Chong Metal Works Ltd.* v. *Lew Fa* [1966] 2 M.L.J. 63.

(2) *Lim Thong Eng* v. *Sungei Choh Rubber Co. Ltd.* [1962] M.L.J. 15 at p. 16.

(3) *Baddeley* v. *Earl Granville* (1887) 19 Q.B.D. 423, 426.

(4) *Imperial Chemical Industries Ltd.* v. *Shatwell* [1965] A.C. 656, 674.

(5) *Abdul Samad* v. *Gammon Christiani-Nielson* [1962] M.L.J. 394, 395.

(6) *Krishnan* v. *Raub Australian Gold Mining Co. Ltd.* [1962] M.L.J. lxxxiii.

(7) *Phua Tin Hang* v. *Teoh Soh Choo* [1964] M.L.J. ex.

(8) *Chin Boon Keng* v. *Sri Jaya Transport Co. Ltd. & Anor.* [1965] 2 M.L.J. 239.

(9) *Lew Fa* v. *Seng Chong Metal Works Ltd.* [1966] 1 M.L.J. 231.

(10) *Van der Velde* v. *Lim Seow Tat & Anor.* [1964] M.L.J. lvii.

CIVIL SUIT.

H. E. Cashin (*David Tay* with him) for the plaintiff.

S. D. K. Peddie for the defendants.

Cur. Adv. Vult.

Yong J.: The plaintiff and one Mustakim bin Yusof were operators of a clicking press employed by the defendants in defendants' factory in Klang. The clicking press was used for cutting into small pieces rubber sheets from a large roll of rubber sheeting, for the purpose of manufacturing buckets. This machine could only be operated by two operators, one standing on the feeding side feeding the rubber sheets from the roll into the cutter after he had powdered them, and the other standing on the opposite side, with the machine standing in between them preventing each from seeing what the other was doing The operator standing on the opposite side would pull the powdered sheets towards him so that when the powdered sheets were directly under the cutter, he would operate the machine by depressing the foot pedal, which would then automatically bring down the cutter, cutting the sheets into the required shapes and sizes.

At all material times the plaintiff was working as the feeding operator and Mustakim as the machine operator on the said clicking press.

It is alleged that while the plaintiff was spreading powder on the rubber sheet, Mustakim negligently caused the cutter to descend and cut the plaintiff's right hand which sustained serious injuries as a result of which four of his fingers had to be amputated at the base of the metacarpal. Photograph P3 clearly showed the extent of the palm of the right hand which had been amputated together with his four fingers.

The plaintiff alleged that the accident was due to (a) the defendants' negligence or the negligence of their servants or agents particulars of which are set out in paragraph 6 of the statement of claim, (b) the defendants' breach of regulations 3 and 32 of the Machinery (Driven Machinery) Regulations, 1959 in that they had failed to provide or erect a guard to prevent the operator's fingers from reaching the danger zone, and (c) the defendants' breach of regulation 4.

Throughout this trial lasting four days I have carefully observed each and every witness who gave his evidence before me. Tan Jik Tan a Government inspector of factories was one of them. He impressed me to be a reliable witness who gave his evidence and opinions fairly and impartially. He said that on receipt of a report of an accident in the defendants' factory he went to examine the defendants' clicking press and found that it had no guard or fence. This was a breach of the Machinery (Driven Machinery) Regulations 1959. He said that the guard must be arranged in such a way so as to prevent the feeding operator's fingers from getting into the gap where the cutters would come down to cut the rubber sheets. To prevent the sheets from sticking to the cutter, powder or chalk had to be spread on them by the feeding operator.

It is conceded by defence counsel that this machine is a clicking press. The relevant parts of regulation 32(i) of the Machinery (Driven Machinery) Regulations, 1959 read: —

"32. (i) Every clicking press using fixed dies shall be protected by one of the means prescribed in Regulation 31(i)."

Regulation 31(i)(a) is as follows: —

"A static fixed guard so arranged to guard the front and both sides of the ram as to prevent the operator's fingers from reaching the danger zone. The distance of the front (or feeding side) of the fixed guard from the ram and length and depth of feed opening shall comply, wherever practicable, with the Third Schedule."

There was considerable argument before me as to which side of this clicking press was the front side. Mr. Peddie contended that regulation 31(i)(a) required the defendants to fix a guard railing in the front side and the sides of the machine, and that since this accident had not happened on any of these three sides, this regulation did not apply and the defendants had therefore committed no breach of any statutory duty. Mr. Peddie, to whom I am grateful, in his usual thoroughness in research, informed me that he could find no decided cases to show the meaning of "which side was the front side." Mr. Cashin, counsel for the plaintiff, on the other hand maintained that the feeding side was the front side.

I do not think it is disputed that the purpose of fixing a guard as required by regulation 31(i)(a) was to prevent the operator's fingers from reaching the danger zone. The Regulations provided that the guard must be so arranged as to guard the front side and both sides of the ram or cutter. The phrases "front or feeding side" and "feed opening" as stated therein must be given their proper and natural meaning. The regulation provided that the distance of the "front or feeding side" of the fixed guard from the ram and the length and depth of the "feed opening" shall comply with certain distances and sizes as given in the Third Schedule. This would indicate that the feeding side of this clicking press was the front side,

where the operator feeds rubber sheets into the ram, and in doing so, his fingers would come in close proximity with the ram and would therefore require protection.

I am fortified in this view by the evidence of the defence witness Lee Fook Keong who has been working as a supervisor in the defendants' factory for 17 years. He knew the machine well and ought to know which side of this machine was the front side. He said that "the feeding side is the front side of the machine."

On the evidence before me I am satisfied and find as a fact that the defendants in breach of their statutory duty had failed to fix any guard of any kind either in the front or feeding side or on any side of the ram or cutter to prevent the fingers of the feeding operator from reaching the danger zone. In my opinion this failure to comply with the Machinery Regulations was the fundamental and proximate cause of the accident. Had a guard in front of the cutter been fixed or installed, with a gap high enough to admit the rubber sheets and low enough to bar the entry of the operator's fingers, accidents such as this would not have occurred.

The next question which I have to consider is whether the defendants had or had not operated the clicking press negligently or allowed it to be so operated in the manner as stated in the statement of claim.

At the time of the accident Mustakim bin Yusof was the defendants' servant, employed to operate the defendants' clicking press. In this trial he was called by the defendants as their principal witness, and his evidence was indeed illuminating. It threw a great deal of light on the manner in which this dangerous machine was being operated. He said: —

"Prior to the accident I have been working on this clicking press for about 1 year, sometimes working on the machine operator's side and at other times at the feeding operator's side. Plaintiff had been working for 14 days immediately prior to the accident. During this period we used to change sides. We changed sides as I wanted to teach him to operate the machine. I knew it was dangerous work on the feeding operator's side. I told him so. I had warned him not to put his hands into the gap. I say that it is dangerous to work on the feeding operator's side because there was no guard between the cutter and the operator, and his hand might accidentally get into the gap and get cut. Occasionally my hand had got into the gap because the machine operator had pulled the rubber sheet. Each time I got my hand into the gap I pulled it out quickly, when I felt that the rubber sheet was being pulled by the machine operator. I also know that immediately after that pull the cutter would come down. I had explained all this to the plaintiff 2 or 3 times during that period of 14 days. In dusting the rubber sheet, I used both the powder bag and my hand. I used my hand to spread the chalk evenly on the rubber sheet. Another reason was when the rubber sheet was crumpled I used my hand to even out the crumples. Occasionally the rubber sheet broke off and I had to use my hand to flatten the crumples. In spreading the chalk evenly on the rubber sheet, I had to use some pressure. For the first two or three days I used to give the plaintiff the warning 'O.K.' before I pressed the pedal. Subsequently I ceased to give him any 'O.K.' warning. I did not see how this accident happened. I only heard a shout from the plaintiff after the accident. I went round to his side and I saw he was injured. He was lying on the ground unconscious."

On his own admission Mustakim was clearly negligent in not giving the warning of "O.K." before he depressed the foot pedal and brought down the cutter to cut the rubber sheet while plaintiff's fingers were still spreading the powder. In my opinion he had negligently operated this machine and thereby caused the accident.

It was equally clear that the present system of work was highly dangerous. Even an experienced operator like Mustakim when working as a feeding operator got his hand into the gap under the cutter because the machine operator had pulled the rubber sheet, and on each occasion he had to pull his hand quickly away from the gap. Any slow withdrawal would mean amputation of his fingers, as had happened in this case to the plaintiff. I hold that defendants were negligent in their failure to provide a safe system of work for their workers.

The defendants knew or ought to have known that the plaintiff was an operator new to his work and had worked as a feeding operator for only a few days. They should have exercised better and more effective supervision and control over him until he was fit to be left alone to work as the feeding operator. In fact both Lee Fook Keong the supervisor of the defendants' factory and Abdul Hamid bin Abu Bakar his assistant admitted that they had not warned the plaintiff of the danger of this machine although they had informed Mustakim.

I hold that the negligence of the defendants and their servant Mustakim have been proved to my satisfaction.

Mr. Peddie submitted that there was contributory negligence on the part of the plaintiff in putting his hand under the blade or cutter when he had been warned not to do so. At the time when his fingers were cut they must have been under the cutter. The question is: did he voluntarily and with his knowledge put his fingers under the cutter or were they drawn under it by the machine operator in pulling the rubber sheets towards him while the plaintiff was still powdering them. On the balance of probabilities I find on the evidence before me that it was more probable than not that he did not voluntarily and knowingly put his fingers under the cutter but that they were drawn under it by the machine operator while the plaintiff was still powdering them. Unfortunately the plaintiff was either not quick enough in withdrawing his fingers or did not realise that the machine operator had pulled them towards the cutter. In his evidence Mustakim said: —

"When the feeding operator was spreading the chalk with his hand near the cutter and the machine operator pulled the rubber sheet, it could happen that his hand was drawn into the gap. The feeding operator must quickly pull back his hand. If he did not do that the knife would come down and chop his hand off. The cutter was under the sole control of the machine operator."

On this point the plaintiff under cross-examination said that he was spreading the chalk when the accident happened. While spreading the chalk, as far as he could remember, his hand did not reach the gap. He did not know how his hand had reached the gap and

got cut. This accident was similar to that which occurred in the case of *Seng Chong Metal Works Ltd.* v *Lew Fa*[1] where Thomson L.P. tersely said: —

"If then the plaintiff was engaged in operating the machine he was operating it for his employer's benefit and it seems to me difficult to suppose that any inadvertence on his part could have gone beyond this that he was concentrating more on his work for his employer than on his own safety. In the circumstances I am not prepared, having regard to the policy of the law which, of course, is to protect workmen operating potentially dangerous machinery, to say any inadvertence on the part of the plaintiff amounted to contributory negligence as we understand that expression."

Ong Hock Thye F.J. (as he then was) went even further when he said: —

"With regard to the cause of the accident, I am satisfied that so far as the respondent was concerned, whatever he did he must have done through inadvertence, which is the type of conduct for which protection is contemplated by the safety regulations, as explained in the case of *Mitchell* v. *North British Rubber Co. Ltd.* (1945 S.C.(J) 69, 73) referred to by me in *Lim Thong Eng* v. *Sungei Choh Rubber Co. Ltd.* ([1962] M.L.J. 15, 16)."

I respectfully adopt and apply the same principles to the instant case. In doing so I have not overlooked the fact that a careful and attentive operator would not have allowed his fingers to be drawn to the danger zone or allowed them to remain momentarily too long under the cutter but an employer is bound under the Machinery Regulations to guard against such inadvertence of an employee who is subjected to the dull monotony of constant repetition of the same movement and by fatigue of continuous concentration. Should such inadvertence occur the employee might find his fingers in immediate danger of being amputated by the cutter. It is to avoid such danger caused by such inadvertence that the Machinery Regulations required the employer to erect a guard or fence to prevent them from reaching the danger zone. As pointed out by Ong J. (as he then was) that the Machinery Regulations "requiring dangerous machinery to be securely fenced are not confined in their application only to the 'prudent, alert and skilled operator intent upon his task, but also to the careless or inattentive worker whose inadvertent or indolent conduct may expose him to risk of injury or death from the unguarded part'." See *Lim Thong Eng* v. *Sungei Choh Rubber Co. Ltd.*[2] I therefore hold that such inadvertence as there was on the part of the plaintiff in this instant case did not go so far as to constitute negligence, contributory or otherwise, of which the court should take cognizance.

Another point raised by Mr. Peddie which had caused some difficulty was the maxim *volenti non fit injuria* pleaded in the defence. He contended that since the plaintiff was fully aware of the danger of operating a clicking press and had by implication voluntarily undertaken the risks, the maxim would afford a good defence to the plaintiff's claim.

The basis of this doctrine, if I understand it correctly, is founded on the implied agreement by the workman with full knowledge of the risks involved, to accept those risks. I have already held that the proximate and fundamental cause of the accident in this instant case was the breach of statutory duty by the employers in failing to install a fence or guard to prevent the fingers of the workman from reaching the danger zone. It seemed to me that any agreement by the workman to waive any breach of the law imposed on the employers and to consent to their flouting of such statutory provisions as are imposed on them for the protection of the workman would appear to me to be highly undesirable if not void. By this I am not saying or expressing any opinion whether it was or was not permissible for a workman to enter into an express agreement with his employers to contract out the latter's common law obligation to exercise due care. But in this instant case the employers were at fault and had committed a breach of a statutory obligation. I am therefore of the opinion that the maxim *volenti non fit injuria* does not apply in this case.

I am fortified in this view by the decision of the court in *Baddeley* v. *Earl Granville*[3] where Wills J. said: —

"But it seems to me that if the supposed agreement between the deceased and the defendant, in consequence of which the principle of *volenti non fit injuria* is sought to be applied, comes to this, that the master employs the servant on the terms that the latter shall waive the breach by the master of an obligation imposed on him by statute, and shall connive at his disregard of the statutory obligation imposed on him for the benefit of others, as well as of himself, such an agreement would be in violation of public policy and ought not to be listened to. On that ground there is much to be said in favour of the opinion expressed in the Court of Appeal that where there has been a breach by a defendant of a statutory obligation the maxim *volenti non fit injuria* has no application."

This passage was quoted with approval by the House of Lords in *Imperial Chemical Industries Ltd.* v. *Shatwell*[4] where Lord Reid at page 674 said: —

"I entirely agree that an employer who is at fault in persistently refusing to comply with a statutory rule could not possibly be allowed to escape liability because the injured workman had agreed to waive the breach."

This brings me to the question of damages which defendants have to pay. By consent special damages were fixed at $1,150. On general damages Mr. Peddie in his usual frankness conceded that a sum ranging from $10,000 to $12,500 had been awarded by the courts in the following cases for loss of a hand: —

(a) $10,000 was awarded in *Lim Thong Eng* v. *Sungei Choh Rubber Co. Ltd.*[2];
(b) $12,500 in *Abdul Samad* v. *Gammon Christiani-Nielson*[5];
(c) $10,000 in *Krishnan* v. *Raub Australian Gold Mining Co. Ltd.*[6];
(d) $12,500 in *Phua Tin Hang* v. *Teoh Soh Choo*[7].

Mr. Cashin however counter-suggested that the general damages excluding loss of future earnings should be between $16,000 and $17,000 but he quoted no comparable cases in support. He placed the possibility of future loss of salary at another $3,000. He said that the modern trend since 1965 was to increase the quantum of general damages and referred the court to *Chin Boon Keng* v. *Sri Jaya Transport Co. Ltd. & Anor.*[8] where the award was increased from $7,500 to "half of $35,000". But this was a case where the whole leg was amputated above the knee. He also referred to *Lew Fa* v. *Seng Chong Metal Works Ltd.*[9] where the award for general damages excluding loss of future earnings was $28,000. But Thomson L.P.[1] had considered this award to be "an extremely

generous one" and would have probably reduced it had there been an appeal against its quantum. Another case Mr. Cashin relied upon was *Van der Velde* v. *Lim Seow Tat and another*[10] where Chua J. awarded $45,000 for general damages. But this was a case where the whole of the plaintiff's right arm half way between the elbow and shoulder was amputated and he was hospitalised for 8 months, 2 in Singapore and 6 in Holland followed by another 5 months in Holland for further medical attention and training in the use of an artificial limb. He was a bank officer drawing a salary of about $1,200 per month. These cases I have studied with care and find them clearly distinguishable from the instant case, in which the plaintiff was a drain cleaner who later became a feeding operator drawing a salary at the time of accident of only $2.50 per working day. After the accident he worked on a scrap machine and his pay was increased to $3.50 per working day. He did not lose the whole of his right hand. Only four fingers and part of the palm were amputated leaving the proximal half of the right palm and thumb intact. He was hospitalised for only 24 days and thereafter was treated as an outpatient for another 30 days. He was 33 years of age at the time of the accident. Taking all these factors into consideration I consider that a fair sum for pain and suffering, disability, loss of amenities and the possibility of future loss of earnings, would be $14,500.

There will be judgment for the plaintiff in the total sum of $15,650 and costs.

Judgment for the plaintiff.

Solicitors: *Murphy & Dunbar; Skrine & Co.*

SHARIKAT EASTERN PLASTICS INDUSTRY v. SHARIKAT LAM SENG TRADING

[O.C.J. (Mohamed Azmi J.) July 5, 1971]

[Kuala Lumpur — Civil Suit No. 2303 of 1968]

Contract — Breach — Failure to deliver goods — Time essence of contract — Waiver — No notice giving reasonable time to complete.

The plaintiff firm claimed damages for breach of contract concerning delivery of certain machinery. In the written contract of sale, it was stipulated that shipment of the said machinery should be during July 1968. The machinery was not so shipped but the manager of the plaintiff firm entered into negotiations with the defendants. No notice fixing a reasonable time for the shipment and delivery of the machinery was given before the plaintiffs brought the action claiming damages for breach of contract.

Held: the plaintiffs had waived the initial stipulation making time the essence of the contract. If they wanted to make time again of the essence of the contract they should have given the defendants a notice fixing a reasonable time for the shipment and delivery of the machinery. As no such notice had been given, the action was misconceived and premature.

Cases referred to:-

(1) *Tan Ah Kian* v. *Haji Hassan* [1962] M.L.J. 400, 402 approved and affd. [1963] M.L.J. 175.

(2) *Webb* v. *Hughes* (1870) L.R. 10 Eq. 281 at p. 286.

(3) *Wong Kup Sing* v. *Jeram Rubber Estate Ltd.* [1969] 1 M.L.J. 245.

(4) *Charles Rickards Ltd.* v. *Oppenheim* [1950] 1 All E.R. 420.

CIVIL SUIT.

D. A. Devadason for the plaintiffs.

Peter Yeoh (*Chew Biman* with him) for the defendants.

Cur. Adv. Vult.

Mohamed Azmi J.: The plaintiff firm claim for damages for breach of contract for non-delivery of one complete set of "CHUBU" Polyethylene Stretched Tapes Making Machine comprising of the following:—

(i) one unit CS40 Extruder with TK650 Take-Up Unit;

(ii) one unit Stretching machine including slitter;

(iii) one unit of 12 Spindles Rewinding machine;

(iv) one unit of "TORRI" Brand 6 Spindle Balling Machine.

The action is based on contract of sale No. LST/026 dated May 17, 1968 by which the defendants as the sole agent of Chubu Machinery & Co. Ltd. of Osaka, Japan (hereinafter referred to as "the Japanese manufacturers") agreed to sell and the plaintiffs agreed to buy the said machinery at a price of £3,170, which is equivalent to M$23,362.90. On the pleadings it is not in dispute that on June 12, 1968 pursuant to the said contract and in consideration of the delivery of the said machinery, the plaintiffs paid a sum of $4,672.58 being twenty per cent of the agreed purchase price of the said machinery at the request and on the demand of the defendants. It is also not in dispute that the balance of the purchase price of $18,690.32 was to be paid to the defendants on delivery of the said machinery.

The main issues in this case are:—

(1) whether time is of the essence of the contract;

(2) whether there is a breach of the contract by the defendants; and, if so, whether the plaintiffs have suffered damage in consequence thereof;

(3) whether the contract has been superceded by a new contract and the original contract has been waived and the defendants discharged from liability.

On the first issue, the general principles as to time being the essence of the contract have been dealt with by Gill J. (as he then was) in the case of *Tan Ah Kian* v. *Haji Hassan*,[1] a decision approved and affirmed by the Federal Court. The three situations in which his Lordship had considered time to be the essence of the contract are: —

(i) where the parties have expressly stipulated in the contract that it shall be so;

(ii) where it was not originally stated to be but has been made so by one party by giving reasonable notice to the other, who has failed to perform the contract with sufficient promptitude, and

(iii) where from the nature of the contract or of its subject matter time must be taken to be of the essence of the agreement.

What is the evidence in the present case? First, there is the C.I.F. contract document itself which